observations that there were reports of effects at exposures below the Commission hazard threshold of 4 watts per kilogram and where such reports suggested *"potentially adverse health effects (cancer) may exist"* and references reports of increased cancer risk by Szmigielski (Biolectromagnetics,1982) and Chou et al. (Bioelectromagnetics 1992). It is interesting to note that the above Szmigelski paper was among the Final List of Papers Reviewed for IEEE C95.1-1991, which only included papers that met the high standard IEEE required of papers to be suitable for standard setting. The study by Chou et al.(1992) was noted in Report #86 of the National Council of Radiation Protection and Measurements ("NCRP") upon which the Commission chose to be the main basis for its exposure limits. In NCRP Section 17.6.2, Considerations For Future Criteria, it is noted that at exposure levels 1/10th of the hazard threshold of the Commission that there was over a 3 fold increase in the incidence of primary malignant tumors.

(2) Also, the National Institutes of Occupational Health ("NIOSH") wrote the Commission concerning the adoption of a standard based on a hazard threshold of 4 watts per kilogram (which is the hazard level of the Commission's present and new rules) that,

"The exposure levels that would be set by the standard are based on only one mechanism - adverse health effects caused by body heating. Nonthermal biological effects have been reported in some studies and research continues in this area [NCRP 1986, WHO, 1993]. The standard should note that other health effects may be associated with RF exposure and that exposure should be minimized." [January 11, 1994 letter of R. Niemier, NIOSH to the Commission, in ET-Docket 93-62]

(3) The International Radiation Protection Association, in its 1988 radio frequency safety standard which is based upon the same hazard threshold of 4 watts per kilogram and the same safety factors advised,

"In view of our limited knowledge on thresholds for all biological effects, unnecessary exposure should be minimized." [IRPA, 1988, Additional considerations section]

(4) The Food and Drug Administration ("FDA") reviewed the IEEE C95.1-1991 RF safety standard (which the Commission has adopted for Personal Communications base stations

and made effective August 1996 [FCC Rule and Order 96-326, Appendix C: Final Rules §1.1307 (b)(4)(ii)] and the FDA gave its comments to the Commission in its letter of November 10, 1993, and stated,

"In our opinion, it is unclear what types of biological effects and exposure conditions are addressed by this standard. For example, very few research studies of long-term low-level exposures of animals were included in the scientific rationale for the standard, despite the existence of animal studies that suggest an association between chronic low level exposures and acceleration of cancer development. Other studies have been published since finalization of the standard that strengthen this concern." [FDA letter of Lillian J. Gill, Interim Director, Office of Science and Technology, Center for Devices and Radiological Health, Nov. 10, 1993 to the Commission, ET-D0cket 93-62]

Commission may not preempt - for as noted in Verb and in Wright, Congress has not given any authority to the Commission to explicitly promulgate public "health and safety" regulations, and this did not change due to the TCA. Indeed, the Commission has noted that, *"EPA* [U.S. Environmental Protection Agency] *is generally responsible for investigating and making recommendations with regard to environmental issues."* [FCC 96-326].

The Commission is referred to the Ad-Hoc Association ex parte submissions in ET-Docket 93-62 and dated June 10, June 30, July 7, July 9, July 14, July 24, July 31, and August 21, all in 1997. Therein further support is given for denying the CTIA Petition. The Commission is also referred to the comments of David Fichtenberg dated October 8, 1997 in ET-Docket 93-62, "Comments on; some statements in support of, and some statements in opposition to some requrests in petitions for reconsideration ("Ad-Hoc Oct 8 1997 Comments"). The Commission is especially referred to Item 3 of the ex parte comments of the Ad-Hoc Association dated June 30, 1997 in ET-Docket 93-62, pages 26 to 38, where arguments are given for the Commission's peremptory power to not have effect, and that "operation" is not among the preempted functions. Also, also especially see the Ad-Hoc Oct 8 1997 Comments that show that the justifications have not been met for preempting state regulations under consideration in the CTIA petition. Furthermore, see "The Commerce Clause and Restrictions On State Regulatory Powers," Chapter

8, in Constitutional Law, 5th edition, by J.E. Nowak and R.D. Rotunda, published by West Publishing, Co., St. Paul, Minn. 1995 - the cases described here indicate that the conditions are not present for the Commission to preempt state or local jurisdiction moratoria explicitly established to study health and safety issues related to issuing permits for radio facilities - since Congress has specifically and explicitly provided in 47 U.S.C. sections 253(b), 332(c)(3) and 332(c)(7), and perhaps elsewhere in the Act, that zoning and land use regulations (including moratoria) pertaining to public safety and health issues may be addressed by the states and not preempted by the Commission.

C.3.12 Based on the "necessary and proper" laws required of Congress, 47 U.S.C. 332(c)(7)(B)(iv) would appear to be found unconstitutional were it is understood to include preemption of public health and safety provisions based upon effects from RF exposure from Commission licensed facilities. Since we presume Congress does not make unconstitutional statutes, it is necessary to interpret this statute so that the Commission only preempts the regulations pertaining to the effects over which it has expertise and authority provided in the statement of purpose and function of the Commission in 47 U.S.C. Sections 153, amd 154.

C.3.13 Article 1, Section 8, of the U.S. Constitution lists the powers and duties of Congress and include the power to regulate commerce among the several States. Within this framework Congress established the Commission, for the purpose, as indicated in Verb at 1293,

"The FCC [Federal Communications Commission] regulates the frequency, channel spacing, and power limitations for cellular telephone use. The FCC also regulates who may provide cellular telephone services and how these service providers must structure their businesses. Therefore, the FCC does not have the responsibility for public safety with regard to cellular telephones as its responsibilities lie in regulating frequency standards.

Also, in Wright, as reported above, that RF standards for power output are set by the FCC, is "irrelevant" regarding being able to preempt state health and safety regulations because,

"the FCC is empowered to regulate frequencies and power of telecommunications items. 'Congress has not empowered the FCC to regulate cellular telephones with regard to health effects and public safety."

To even further establish this fact, the Commission itself on numerous occasions has noted it does not have the expertise to develop RF health and safety exposure criteria. For example the Commission has stated,

"In the past, the Commission has stressed repeatedly that it is not a health and safety agency and would defer to the judgment of these expert agencies with respect to determining appropriate levels of exposure to RF energy." [see paragraph 28, FCC 96-326, August 1, 1996, and for a listing of such statements by the Commission see footnote 41 therein].

C.3.14 Therefore, if nevertheless, the Commission claims it now does have such peremptory authority over health and safety regulations based upon section 332(c)(7)(B)(iv) and (v), then the Commission's understanding renders the statute unconstitutional. This is because U.S. Constitution lists the powers of Congress, as noted above, and then requires Congress,

"To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." [Article 1, Section 8]

Based on the Commission's understanding of 47 U.S.C. section 332(c)(7)(B)(iv), Congress has delegated limited and specific authority for the Commission to preempt state and local jurisdiction health and safety regulations on a topic about which the Commission has no expertise, and no delegated authority to establish peremptory environmental public health and safety regulations - as its functions do not include being an environmental health agency -as noted in Verb and Wright. Accordingly, if the Commission's interpretation is followed, then 47 U.S.C. section 332(c)(7)(B)(iv) is unconstitutional because the statute improperly assigns peremptory authority over an environmental public health topic to an agency which has no expertise in the subject and no delegated authority to be responsible for being an environmental health agency. While the National Environmental Protection Act of 1969, 42 U.S.C. Section 4321, et seq. provides that federal agencies take into account the environmental impacts their actions may have on the quality of human life, this in no way establishes that an agency has the expertise and authority to be an environmental health agency with regard to certain limited public health and safety concerns.

C.3.15 Consequently, since there should be a presumption that Congress does not intend to make unconstitutional statutes, it should be assumed that the "environmental effects" intended in 47 U.S.C. Section 332(c)(7)(B)(iv) are those environmental effects for which the Commission does have expertise and has been delegated general authority to implement - that is the environmental effects which may interfere with the Commission's primary objective of assuring no interference of the signals of one licensee with others - as so regulate power output and related matters to achieve this objective - which was identified in Verb and Wright in the above quotations.

C.3.16 As noted earlier above, there is evidence supporting there is good cause to find the Commission does not have expertise in RF health and safety and therefore cannot preempt state and local health and safety regulations more stringent than those of the Commission.. One key set of evidence is the many RF health and safety directives and recommendations given to the Commission by the federal health and safety agencies, but which the Commission has denied to implement, and moreover, yet claims that it has so implemented [these federal health and safety agencies being the U.S. Environmental Protection Agency ("EPA"), the Food and Drug Administration ("FDA"), the National Institute of Occupational Safety and Health ("NIOSH"), and the Occupational Safety and Health Administration ("OSHA").

For example:

C.3.16.1. Commission refuses to adopt the NIOSH directive to keep exposure as low as reasonably achievable

NIOSH told the Commission that its hazard threshold of 4 watts of RF energy absorbed per kilogram of body weight (4 W/kg) is a specific absorption rate (SAR) that is

"based on only one dominant mechanism - - adverse effects caused by body heating. Nonthermal biological effects have been reported in some studies and research continues in this area. The standard should note that other health effects may be associated with RF exposure and that exposure should be minimized to the extent possible." [NIOSH letter of January 11, 1994 from R. W. Niemier to the Commission in ET Docket 93-62]

Yet while the Ad-Hoc Association petitioned the Commission not to deny this NIOSH recommendation but to adopt this above NIOSH directive [see Ad-Hoc Petition for

Reconsideration of FCC 96-326 ("Ad -Hoc Petition") at page 18-19, and FCC 97-303 at paragraph 25], the Commission has denied this Ad-Hoc Petition request, and yet the Commission continues to claim *"we adopted the RF exposure limits that addressed specific safety matters raised by these agencies* (e.g. EPA, FDA, NIOSH, OSHA). [FCC 97-303 paragraph 39]

C.3.16.2. The Commission refuses to clarify the limited protection of its standard, even though the Ad-Hoc Association has requested the Commission inform the public of the protection EPA, NIOSH, and FDA indicate the Commission's rules provide.

The Ad-Hoc Petition objected to the Commission's stating,

(1) "We believe that the guidelines we are adopting will protect the public and workers from exposure to potentially harmful RF fields." [FCC 96-326 at para.1],

(2) "We believe that the regulations that we are adopting herein represent the best scientific thought and are sufficient to protect the public health." [FCC 96-326 at para. 168]

Yet consider what the federal health agencies told the Commission regarding standards based upon the Commission hazard threshold of 4 W/kg and safety factor of 1/10th and 1/50th for 'controlled/occupational' and 'uncontrolled/general public' exposure:

(1) FDA stated the Commission's limits,

"can induce failures in medical devices that can cause injury or death." [FDA E. Jacobson to FCC, dated July 17, 1996, in ET Docket 93-62].

Also, dramatic decreases in the "quality of life" can be expected for the growing number of people who use hearing aids since there is considerable documentation that at levels even 1/100th of that deemed 'safe' by the Commission, that hearing aid interference will be substantial [see Ad-Hoc Petition at page 16, and footnote 77 therein] Also, see considerable documentation in H.Bassen, "RF interference of medical devices by mobile communications transmitters," in Mobile Communications Safety, published by Chapman & Hall, 1997, pages 65-94; here RF interference with hearing aids, apnea breathing monitoring machines, ventilators and other medical equipment is documented to occur at Commission allowed levels from cellular base station transmitters, with an example of an apnea breathing monitor failing due to "mobile communications base stations up to 100 meters away..." [page 72 of the H.Bassen article above]

Thus, it is clear that quality of life for the growing retired population and others using hearing aids will likely be adversely affected by the Commission's exposure criteria.

(2) FDA said,

"we did not believe that ANSI/IEEE C95.1-1992 addresses the issue of long-term, chronic exposures to RF fields" [same letter by E. Jacobson].

The above FDA conclusion also applies to the Commission's limits, since the Commission's RF limits are based upon ANSI/IEEE C95.1-1992 and that of the National Council for Radiation Protection and Measurements ("NCRP") 1996 [see footnote 1 of FCC 96-326], both of which do not address chronic exposure to RF fields and so both share the same uncertainty noted by FDA.

Also, regarding ANSI/IEEE C95.1-1992, which also applies to the Commission's limits, FDA reported, *"it is unclear what types of biological effects and exposure conditions are addressed by the standard."* [FDA letter of L.Gill to the Commission dated Nov. 10, 1993 in ET-Docket 93-62 and attached to Comments of the Ad-Hoc Association in this Supplemental Pleading regarding FCC 97-264.

(3) NIOSH - see NIOSH comments above on limited protection provided by the Commission's hazard threshold and need "to minimize exposure to extent possible."

(4) EPA noted to the Commission that the Commission's hazard threshold of 4 W/kg only protects against thermal effects [as noted by NIOSH], and that adverse effects (cancer) have been observed below the Commission's hazard threshold [see EPA letter of M.Oge to FCC dated Nov. 9, 1993; and see the N. Hankin letter of October 8, 1996 to David Fichtenberg - both in ET-Docket 93-62, and filed with Comments of Ad-Hoc Association in this Supplemental Pleading cycle regarding FCC 97-264]. A further letter dated January 17, 1997 from EPA M.Nichols to the Commission confirmed N. Hankin's comments above correctly construes the EPA Administrator's position - as is clear from the her report that *"Mr. Hankin's response has been incorrectly construed as a departure from the Administrator's position in July (1996)."*

Yet the Commission continues to state,

"We believe that the guidelines we are adopting will protect the public and workers from exposure to potentially harmful RF fields," [FCC 96-326 at #1], yet none of the federal health agencies have given this evaluation, and indeed have indicated otherwise as noted above.

C.3.16.3. The Commission has made most of the public areas of the nation subject to the 'occupational/controlled' levels which for the public is 5 fold the levels recommended by EPA. This occurred due to the Commission's refusing to adopt the time averaging provisions of the EPA recommended NCRP 1986 section 17.4.3, even though the Commission claims it does follow that section, and states,

"Accordingly, as recommended by the EPA we are adopting exposure limits for field strength and power density based on those recommended by NCRP for frequencies from 300 kHz to 100 GHz... [see FCC 96-326, para. #28]".

Yet, the RF NCRP 1986 standard Section 17.4.3 specifies that general population exposure limits equal to 1/5th of that for occupational exposure should apply for exposures averaged over 30 minutes. It also states,

"At the same time, the 30 minute-time-averaging period is responsive to some special circumstances for the public at large. Examples are transient passage by the individual past high-powered RFEM (radiofrequency electromagnetic) sources, and brief exposures to civil telecommunications systems." [NCRP section 17.4.3, 1986]

Thus, NCRP 1986 puts the burden on the telecommunications operator to assure that the public passes quickly enough through high RF exposed areas so that the average of 30 minutes of exposure still does not exceed 1/5th of that for the occupational exposure.

Moreover, EPA told the Commission to adopt the NCRP standard, except for some elements related to shock and burn. [letter of M.Oge noted above].

Also, the Commission has stated, *"We are adopting exposure limits for field strength and power density based on those recommended by the NCRP ..."* [FCC 96-326, para #28].

Furthermore, EPA stated,

"We strongly disagree with the use of the concepts of control and awareness...awareness in a controlled environment can vary from complete knowledge to almost no knowledge..." [above letter of M. Oge]

Also, the Commission noted that NIOSH stated, *"that where there is any question about exposure category, the more conservative uncontrolled criteria should be used."* [FCC 96-326, para #40]

Yet, in spite of all of the above, the Commission nevertheless has allowed that in public areas in which the public may be in *"transient passage"* - ***which includes almost all public areas in the nation,*** exposure levels may be set at the 5 fold higher occupational/controlled level, and the Commission has stated for its 'occupational/controlled' RF exposure limits,

"Limits for occupational/controlled exposure also apply in situations when an individual is transient through a location where occupational/controlled limits apply provided he or she is made aware of the potential of exposure." [see Note 1 to Table 1 of 47 CFR section 1.1310].

Thus, in contradiction to (i) NCRP 1986 sec. 17.4.3,, (ii) the above EPA recommendation to use NCRP 1986, and (iii) the EPA strong disagreement that exposure limits depend only on awareness, (iv) in contradiction to the Commission's statements about following NCRP 17.4.3, and (v) in contradiction to the NIOSH directive,

"that where there is any question about exposure category, the more conservative uncontrolled criteria should be used." [FCC 96-326, para #40]

nevertheless, the Commission is doing otherwise, and has adopted a provision that may allow the bulk of our public areas throughout the nation, through which people may be in "transient passage", to be subject to 5 fold higher RF exposure than was intended by NCRP 1986.

Not only did the Commission deny the Ad-Hoc Association request to follow the EPA recommended provisions of NCRP 17.4.3 [see Ad-Hoc Petition at item 21, page 16] and the NIOSH precautionary directive above, but in denying this Ad-Hoc Association request, the Commission claims incorrectly,

"The guidelines and rules we adopted in the Report and Order [FCC 96-326] addressed the concerns raised by the health and safety agencies..." [FCC 97-303, para. #30]

C.3.16.4 The Commission denies the Ad-Hoc Association request that the Commissions rules include OSHA required elements of an RF safety program.

In its "General Comments" NIOSH emphasized to the Commission that its proposed standard,

"provides minimal guidance on control measures, appropriate medical surveillance, training, or hazard communication." [NIOSH letter of R. Niemier noted above].

Also, OSHA told the Commission to,

"require its applicants to implement a written RF protection program which appropriately addresses traditional safety and health program elements including training, medical monitoring, protective procedures and engineering controls, signs, hazard assessments, employee involvement, and designated responsibilities for program implementation;" and that the effect of such a program be that *"persons exposed above the uncontrolled environment criteria would be protected by a program designed to mitigate any potential increase in risk."* [OSHA letter of March 1 ,1994 to FCC from S. Mallinger,in ET Docket 93-62, and attached to Ad-Hoc Comments in this Supplemental Pleading regarding FCC 97-264].

Yet, the Commission has refused to put any of the above provisions into its rules, and provides only that to be subject to higher levels of exposure a worker must be *"fully aware of the potential for exposure and can exercise control over their exposure."* [Note 1 to Table 1 of 47 CFR Section 1.1310]

While the Ad-Hoc Association had asked that the Commission include the above OSHA elements and their objective as shown above, it refused to do so. In the Commission's rules or OET Bulletin 65 is there no provision for medical monitoring, no provision for a written RF safety program, no provision for designated program responsibilities, and no mention that the impact of the program should be to mitigate increased risk. There is only mention of using warning signs, optional protective clothing, controlling length of time of exposure - all provisions only to be applied to assure that 6 minute averaged maximum limits are not exceeded. This is not sufficient to do what OSHA directed. Furthermore, OSHA's August 2, 1996 letter to the Commission stated the Commission's limits only "would be appropriate in a comprehensive RF protection

program, and part of an employer's overall safety and health program." But since the Commission has not required the elements, given above by OSHA, be listed for inclusion in a comprehensive program, a careful reading of the OSHA response indicates that it cannot support the Commission's limits due to the lack of the needed RF safety program which OSHA required as a condition for allowing the Commission's limits, and such an RF safety program having the effect that the increased risks from such limits could be safely mitigated.

C.3.16.5 The Commission has not made any reasonable provisions to assure out-of-compliance conditions are detected

In the Commission's Final Rule, the provisions indicating when a routine evaluation is required to determine if there is and out-of-compliance condition **completely ignores the proximity of nearby buildings** to towers or other structures that are over 10 meters high and that are not residences or workplaces (e.g. street lights, telephone and electric utility poles, street signs, billboards, etc.). Thus, a 4 story apartment or office building may be only a few feet from a powerful 35 foot high transmitter and no evaluation for compliance is required. [see Section 47 CFR Section 1.1307(b)(1) Table 1 - found in Appendix A of FCC 97-303]

Moreover, even if the total sum of output power in an area is high and causing an out-of-compliance condition, still there may be no requirement for a routine evaluation. This can occur if many operators share a single tower, rooftop, or side of a building, or are close to nearby buildings also with transmitters, if the transmitters "owned and operated" by <u>each</u> operator meet the criteria for not having to be evaluated for an out of compliance condition, then no evaluation is required regardless of the total sum of output power for all of the transmitters in the area. [see FCC 97-303, para #76]

Thus, the Commission has not adequately provided for detecting some of the major ways out-of compliance conditions may occur. 47 CFR §1.1307(c) allows for interested persons who believe that out-of-compliance conditions are occurring to petition the Commission for a review of the matter and possibly to require an environmental assessment. However, on a practical level, it is unclear whether this will address the need. "Interested persons" may not have the resources to identity the total power output from an area, and/or to measure and demonstrate evidence of

likely being out-of-compliance. Since the Commission presumes categorically excluded facilities are in compliance, it is unclear on a practical level that the circumstances noted above that may cause an out-of-compliance condition will be identified by "interested persons" and sufficiently documented to lead to the decision of requiring an environmental assessment.

Thus, it appears that the Commission has not adequately provided for adequately identifying out-of-compliance conditions.

C.3.17 Thus it appears that the Commission has not issued limits that appropriately follow the recommendations of the federal health agencies, do not provide protection from interference to hearing aids and sensitive medical devices (which more frequently are found in residential settings), and do not adequately provide for routine evaluations that will detect out-of-compliance conditions. This demonstrated lack of expertise to assure the public health and safety is protected supports the conclusion that to give to the Commission preemption authority over public health and safety regulations of local jurisdictions would be an improper delegation of authority by Congress, as Congress is authorized only,

*"To make all Laws which shall be necessary and **proper** for carrying into Execution the foregoing Powers."*

The above requirement protects public health and safety protection regulations of States from being preempted through the Commission's issuing RF exposure public health and safety related rules which in significant ways are (i) contrary to the recommendations and findings of the federal health agencies, (ii) allow exposures which could cause death (due to failure of medical devices exposed to base station transmitter), (iii) and do not adequately assure out-of-compliance conditions are detected.

The above public health and safety protections are provided by either (i) correctly interpreting that the "environmental effects" in 47 U.S.C 332(c)(7)(B)(iv) only pertain to effects over which the Commission has expertise, e.g. related to interference with broadcast transmissions; or (ii) if the Commission's interpretation is followed, then the statute is unconstitutional because such an interpretation would place the power to set peremptory

regulations on health and safety by an agency without the expertise to do so, or the delegated authority to be a health and safety agency.

That rules with significantly adverse effects may occur when an agency does not have the appropriate expertise and authority is demonstrated in the examples in 2.5 above. Therefore, the Commission should further find that based on Verb, Wright, and the other arguments above, that it cannot preempt when moratoria are based upon a bona fide need to determine appropriate regulations pertaining to RF health, safety, and quality of life considerations, especially when these considerations primarily pertain to the "operation" of any radio facilities.

Therefore, when the Commission establishes procedures and rules for processing disputes arising out of and properly based upon 47 U.S.C. 332(c)(7)(B)(iv), the Commission the procedures should require that relief from disputes arising out of state or local jurisdiction bona fide health and safety regulation of the placement, construction, modification, or operation of personal wireless service facilities should be addressed to the court of competent jurisdiction, since the 'environmental effects' which the Commission may preempt are only those over which it was explicitly granted when statute stated the function and purposes of the Commission and established the Commission's area of expertise - which does not include authority and expertise in health and safety regulation.

C.3.18 The TCA specifies that there should be "No Implied Effect," and states,

"This Act and the amendments made by this Act shall not be construed to modify, impair, or supercede Federal, State, or local law unless expressly so provided in such Act or amendments. [TCA, Section 601(c)(1)] Please note that Paragraph 7iv-v

(i) does not expressely indicate that it pertains to preempting health and safety hazards;

(ii) does not expressly indicate that it expands the jurisdiction and functions of the Commission to include setting preemptory health and safety regulations;

(iii) does not expressly indicate that state regulations to protect the public safety and welfare which TCA section 253(b) protects from Commission preemption, is nevertheless preempted by language in Paragraph 7iv-v;

(iv) does not expressly indicate that regulation of the "operation" of personal wireless services is among the list of functions which the Commission may preempt, but rather would be among those regulations subject to review by courts of competent jurisdiction as provided by the intent of Congress in 47 U.S.C. 332(c)(7) provisions; and especially does not expressly indicate that operation regulations to protect the public health, safety, or welfare are preempted.

Moreover, the Joint Explanatory Statement regarding 47 U.S.C. 332(c)(7) explicitly states that 'safety concerns' may be taken into account, and that decisions of what uses may be allowed in different zones may be based upon such safety concerns, and states,

"The conferees also intend that the phrase "unreasonably discriminate among providers of functionally equivalent services *"will provide localities with the flexibility to treat facilities that create different visual, aesthetic, or safety concerns differently to the extent permitted under generally applicable zoning requirements even if those facilities provide functionally equivalent services."* [Conference Report of TCA, Report 104-458, page 208]. However, in the same Conference report section, when discussing the Commission's preemptory authority, there is no mention made of 'safety concerns,' further supporting the claim that Congress did not intend for the Commission to become established as a health and safety agency with preemptory authority over safety concerns, including health and safety concerns due to RF exposure.

C.3.19 An established history of judicial precedent finds that unless Congress expressly preempts state or local health and safety regulations, that the Courts will not read an implied intent by Congress to do so, and indeed are very reluctant to do so.

Congress has not explicitly preempted state or local "operation" or regulation of "placement, construction, and modification" for the purpose of protecting public safety and welfare

It has been noted that *"Congress does not cavalierly preempt all state law causes of action."* [Medtronic, Inc. v. Lohr, U.S. 116 C.Ct. 2240, 2250 (1996)]. Also, *"there is a strong presumption that Congress must affirmatively oust or divest state courts of jurisdiction over a federal claim"* [Grotemeyer v. Lake Shore Petro Corp. 235 Ill. App. 3d 314 (1st Dist. 1992].

Consider that *"Congress can assert exclusive power either by explicit statuary language or by regulating matter in such detail as to leave no room for state involvement."* [U.S.C.A. Const.Art. 6.cl 2] However, we see above that not only have the courts found that the Commission does not have peremptory authority regarding health and safety matters [noted in item 3.5.1 as per Verb v. Motorola and per Wright v. Motorola], but that in Sec. 253 of the TCA, Congress explicitly gave authority to the states to regulate for the purpose to *"protect the public safety and welfare."*

C.3.20 Arguments are invalid that claim the preemptions under discussion here are needed so that the will of Congress will not be frustrated or that the intent of the TCA is to completely "occupy the field" of regulations pertaining to health and safety. This is clear since Congress placed a newly added statute, Section 253(b) in TCA to indicate that even when state regulations create "barriers to entry," still they are protected from Commission preemption if such regulations are to protect the public safety and welfare. Furthermore, the Senate/House Joint Conference, no doubt upon consultation with the President, decided to remove *"operation"* from the House version HR 1555 of the TCA; this removal of "operation" indicated an intent by Congress that ***all*** disputes over state or local jurisdiction regulation of the "operation" of personal wireless service facilites be reviewed by the courts. Thus, *consistency* of jurisdiction for state or local regulation of personal wireless service facilities appears to be the intent of Congress; thus Congress intended that all operation regulations of personal wireless service facilities be subject to review only by the courts regardless whether these operation regulations were pertaining to the noise of electric generators, the times when scheduled equipment maintenance can occur in residential neighborhoods (so as not to disturb residents), or allowed RF exposure levels during operation.

C.3.21 The courts have ruled that in a subsequent rulemaking or other decision making, the Commission may reverse or otherwise significantly change its past decisions, the only requirement being that a logical reasonable rationale be given. Accordingly, while the Commission has found in its Final Rule in ET Docket 93-62, given in FCC 97-303, that in some circumstances it may preempt the "operation" of personal wireless service facilities, it is hereby seen that the courts

allow for the Commission to also change its decision. Below are given some reasons for the Commission to so change its decision on this matter.

C.3.22. Arguments pertaining to whether the Commission may preempt "operation"

C3.22.1 In the Commission's Second Memorandum Opinion and Order, FCC 97-303, released August 25, 1997, the Commission discusses, in paragraphs 78 to 90, the question of whether the Commission has authority to preempt *"operation"* of personal wireless service facilities on the basis of the environmental effects of radiofrequency emissions from such facilities.

The Commission correctly noted (in para. 84) that David Fichtenberg (Fichtenberg) opposes the proposal of Ameritech to preempt the operation of personal wireless service facilities, and that Fichtenberg justifies the legal basis for such opposition in part by noting that while the House version of the Telecommunications Act, H.R. 1555 does provide for "operation" among the list of preempted functions, that in the Joint House/Senate conference report this function is removed. Accordingly, Fichtenberg argues that the Conference Report explicitly addressed the matter and that Congress was sensitive to many constituencies and decided to make a compromise which included explicitly removing "operation" from the list of preempted functions. Thus, not only is the term "operation" absent in the final Telecommunications Act of 1996 (TCA), but one cannot argue this was an oversight, but rather that Congress did not intend for the Commission to preempt operation of transmitting facilities on the basis of 47 U.S.C. 332(c)(7)(B)(iv) and (v).

The Commission then reports Ameritech's disagreement with the above logic, stating,

"The limitations on the role and powers of the Commission under this subparagraph relate to local land use regulations and are not intended to limit or affect the Commission's general authority over radio telecommunication, including the authority to regulate the construction, modification, and operation of radio facilities." [TCA Conference Report at page 209] Ameritech then argues, *"this language clearly indicates that Congress recognizes the Commission's plenary authority over the operation of radio facilities and intends that the FCC continue to exercise this authority without limitation. Ameritech contends that this language suggests that the word "operation" was merely deleted because it was superfluous."* [FCC 97-303 at para 84, based upon Ameritech Reply at page 2 citing Conference Report at 209].

The Commission then reports that the Electromagnetic Energy Association (EEA) *"agrees that, under the opposing commenter's interpretation, a locality could not prevent the siting and construction of an FCC-licensed facility but could, nonetheless, prevent its operation. According to EEA, this would be a complete evasion of Congresses mandate for preemption of the regulation of RF emissions."* [FCC 97-303 para 85, citing EEA Reply to Opposition at 5].

In its Decision, the Commission states,

"we agree with Ameritech that Congress did not intend to prevent the Commission from preempting state and local regulations concerning the operation of facilities simply by deleting the term "operation" from the final version of Section 332(c)(7). On the contrary, Congress made it clear, in the Conference Report, that enactment of Section 332(c)(7) of the Communications Act was not meant to affect the Commission's general authority to regulate the operation of radio facilities. We find that the alternative reading is illogical and would render the statute useless and produce absurd results which Congress could have not intended. Therefore, we will continue to consider requests for relief of state and local government actions that prescribe or restrict the operation of personal wireless facilities pursuant to the authority granted to the Commission by Congress in Section 332(c)(7)." [FCC 97-303 at para. 89]

C.3.22.2 The Commission has overlooked or misunderstood considerations when it justifies that Congress intended to preempt "operation" in Section 332(c)(7)

C.3.22.3 Ameritech's citing of the Conference Report section above [Conference Report at 209] is irrelevant to the question at hand. That Congress intends for the Commission to have general and plenary authority over the construction, modification and operation of radio facilities is not being questioned. Rather the question is whether that authority extends to preempting state and local jurisdiction requirements that are even more stringent. Based on the logic of Ameritech, the general authority of the Commission over the construction, modification, and operation of radio facilities extends to preempting any state or local jurisdiction authority, whatsoever, over these functions. However, the Joint Explanatory Explanatory Statement in the Conference Report states concerning Section 704 of the TCA that, except for provisions in 47 U.S.C. 332(c)(7)(B)(iv) that,

"Any pending Commission rulemaking concerning the preemption of local zoning authority over the placement, construction, or modification of commercial mobile services (CMS) facilities should be terminated."

This most clearly indicates that the "general authority" noted, as above [in the Conference Report at page 209] and in this same Section 704, does not at all imply that this authority allows preemption of local zoning authority of any of the functions named as within the "general authority" of the Commission; for Congress is stating just the opposite. That is, while the Commission has "general authority" over the construction, modification, and operation" of radio facilities, it has only very limited authority to preempt local jurisdictions setting more stringent requirements in its local zoning and land use codes. Therefore, Ameritech's bringing this "general authority" cited in the Conference Report as a justification for a specific preemption of "operation" is irrelevant to the question at hand.

What Ameritech must show, but did not show, is that Congress intended to include "operation" among preempted functions of *"placement, construction, and modification"* given in Section 332(c)(7)(B)(iv). Then, without any rationale or justification, Ameritech proclaims that "operation" was *"superfluous."* Considerations of where a wireless transmitter is placed and how it is built, is distinctly separate from regulating its operation once it is built. While there is some relationship between exposure and placement and construction it is not a strict one. For example, if the RF exposure limit in an area is a given value, then an operator (i) may seek to place a transmitter a given distance from populated areas; or alternatively, (ii) place the transmitter near populated areas but at a height sufficiently above nearby buildings so exposure will be low; (iii) or the operator may reduce the power output from the transmitte (iv) or the operator may keep the height and power the same, but use a series of directional transmitters, so that nearby buildings in, perhaps just one direction from the transmitter, do not receive excessive exposure.

Moreover, the Commission has stated that *"The exposure levels measured at ground level around typical cellular towers are hundreds or thousands of times lower than the above limits.* [FCC Cellular Telephony Facts, Version December 1994, copied from FCC Web site on February, 18, 1997].

Thus, a local zoning or land use requirement that the facility operate so as not to cause the RF exposure of the public to exceed a given value does not necessarily directly impact the placement, construction, or modification of "typical" personal wireless service facilities. Furthermore, were levels such that RF limits may play a factor, it is seen there are many alternatives an operator can chose so that the facility is placed and constructed meeting only Commission requirements, but will operate within local zoning and land use requirements.

Finally, Ameritech argues against itself when it states that "operation" was removed because this word was superfluous. For if "operation" is superfluous, then why did Congress also leave it in as part of the list of function among the "general authority" list Ameritech cites? Is Ameritech suggesting that Congress removed a "superfluous" word, and yet eleswhere in the same section left the word in? And all this while the House and telecommunciations operators were likely urging the word "operation" stay as in the House verion (H.R. 1555). The answer is clear - Clearly, Congress intended to remove "operation" from the list of preempted functions, and not because the word "operation" is superfluous.

C.3.22.4 EEA is in error when it claims in its reply comments, as reported by the Commission that, "under the opposing commenters interpretation, a locality could not prevent the siting and construction of an FCC licensed facility but could, nonetheless, prevent its operation." [reported in FCC 97-303 para. 87], and appears to have overlooked some of the key provisions of the Communications Act as amended by the TCA. For example:

47 U.S.C. 332(c)(7)(B)(i)(II) requires that local zoning and land use ordinances ***"shall not prohibit or have the effect of prohibiting the provision of personal wireless services,"*** and if local jurisdiction rules on exposure are so stringent that such prohibition actually takes effect, then 332(c)(7)(B)(v) provides for redress from a court of competent jurisdiction - the solution provided by Congress.

Thus, EEA in suggesting that an operator could place and construct a facility, but not be able to operate it, is incorrect, because a pervasive ordinance having the effect of prohibiting all such operation would violate 332(c)(7)(B)(i)(II) above, and such ordinance would be set aside by the court of competent jurisdiction, as provided for by Congress in Section 332(c)(7)(B)(v).

C.3.22.5 Finally, let the Commission consider its own decision in this matter. As noted above, the Commission concluded the reading by Fichtenberg *"is illogical and would render the statute useless and produce absurd results which Congress could not have intended."* [FCC97-303, para 89].

However, the Commission appears to have overlooked that Congress specified that if any local zoning or land use action has the effect of prohibiting personal wireless services, then redress can be sought in a court of competent jurisdiction. This applies both to any local jurisdiction RF exposure criteria that may be established, and applies to any moratoria to study and determine what RF exposure levels should be, how to monitor them, and how to monitor possible health effects. Should any such moratoria exceed what any party considers reasonable, then redress due to a "failure to act" can be sought from a court of competent jurisidiction as Congress provided in 332(c)(7)(B)(v).

Thus, Congress decided that local zoning ordinances cannot prevent personal wireless services facilities from being placed in any type of zone, residential or commercial, because of RF environmental effects. However, it is also clear that Congress made some compromises. By removing the "operation" preemption from the House version H.R. 1555 and keeping in the provisions that local zoning cannot prohibit or have the effect of prohibiting personal wireless services, Congress has said that states and local jurisdictions must allow personal wireless service facilities to be placed and built, but that local zoning ordinances can still regulate how these facilities operate - except that the impact of such local zoning cannot be so restrictive as to prohibit or have the effect of prohibiting personal wireless services networks - and that should such prohibits occur then, other than provisions in 332(c)(7)(B)(iv), "the courts shall have exclusive jurisdiction over all other disputes arising under this section - and clearly the existence of a moratorium has been a cause for dispute.

This above interpretation seems logical, consistent with the straightforward wording of the text, consistent with Congresse's removning "operation" from the preempted functions, and clearly does not produce "absurd results," but rather seems to strike the balance that Congress intended - to make sure such facilities can be placed wherever permitted by the Commission. But

their operation may still be regulated by local jurisdictions, but only in a limited way, for limitations in 332(c)(7)(B)(i)(I and II) apply to and force local zoning and land use ordinances to nevertheless allow personal wireless service networks to operate - thus limiting the extent which they can be regulated by such local zoning authority.

Moreover, that Congress was ready to have states and local jurisdictions establish regulation of the operation of telecommunications facilities, including the setting of RF health and safety exposure limits can be seen from provisions in 47 U.S.C 332(c)(3) for mobile services and 47 U.S.C 253(b) for telecommunications services in general. Specifically, in 47 U.S.C. 332 which addresses Mobile Services, regulation of State Preemption by the Commission is proscribed in 47 U.S.C. 332(c)(3) and states,

"...no State or local government shall have any authority to regulate the entry of or the rates charged by any commercial mobile service, except that this paragraph shall not prohibit a State from regulating the other terms and conditions of commercial mobile services."

Thus, states are allowed to 'share authority' with the Commission, and the preemption authority of this paragraph is strictly limited, and excludes regulation of the operation of commercial wireless services and other conditions of commercial wireless services not preempted in section 332(c)(7)(B).

Thus, it is seen that Congresses noting the "general authority" of the Commission over the construction, modification, and operation of radio facilities is, and must be, seen as an authority shared with States, at least under the provisions of section 253(b), 332(c)(3), and 332(c)(7)(B). This further illustrates that Ameritech's observation of the "general authority" noted by Congress is in fact irrelevant to the question of the question of whether "operation" was preempted. For by Ameritech's logic Section 253(b) would not exist since it provides that requirements imposed by states to protect the public safety and welfare (for at least non-personal wireless service facilities) may not be preempted by the Commission - which is contrary to the logic Ameritech derives from Congresses "general authority" of the Commission noted in the Conference Report at page 209.

Therefore, when the Commission suggests that based on the reading of the Ad-Hoc Association the results would be both illogical and absurd, it appears that Congress did not think so. But rather Congress intended that disputes over *any* state or local jurisdiction regulations of the operation of personal wireless service facilities be reviewed by the courts -whether the regulation be over the operation of noise from electrical generators, times for servicing transmitters located in residential areas, or amount of RF exposure to be permitted when the transmitters are in use in residential, commercial, mixed-use, and other zones. Thus, Congress sought consistency, and sought that any regulation of the operation of these facilities be reviewed by one authority - the courts. The Commission cannot read into and turn upside down through implications and suppositions what Congress has expressly removed from Commission authority. Moreover, concerning regulations based upon bona fide health and safety concerns, the Commission cannot ignore the long established judicial history which finds impermissible to preemption of state and local health and safety concerns without clear intent by Congress - especially in the TCA where Congress has made more explicit the rights of states to regulate to protect public safety and welfare.

Accordingly, if the Commission finds the above reasoning of Congress illogical or absurd, then the Commission should advise Congress of the changes to be made in statute. Unitil then the Commission must follow the law and not change it. Therefore, as the Commission is developing procedures and rules for reviewing potential violations of 47 U.S.C. 332(c)(7)(B)(iv), the procedures should state that disputes pertaining to the operation of these facilities, whether such disputes occur during proceedings addressing a land use permit request or after the permit is given, in any case such relief concerning such disputes is to be sought from the courts.

D. Courts determine when conditions apply for relief to be sought from the Commission

Courts of competent jurisdiction may rule on whether a party to a dispute inappropriately sought relief from the Commission under 47 U.S.C. 332(c)(7)(B)(iv)-(v). This ruling can be made when a state or local jurisdiction receives notice from the Commission of complaint of such a party, and may then apply to a court of competent jurisdiction to rule that it has jurisdiction.

Commission rules should provide that when such a determination is made by a court of competent jurisdiction that the Commission will allow the dispute to proceed through the courts.

E. Fear of adverse effects is not an environmental effect, and regulations based on it may not be preempted by the Commission

E.1 State and local jurisdiction decision based upon public opinion and public fears about potential adverse health and safety effects from RF exposure do not qualify as being made "on the basis of the environmental effects of radio frequency emissions" since such fears may exist without any actual environmental effects occuring. The Congressional statute is referring to state and local regualtion that is based on the assertion of the existence of certain environmental effects, direct or indirect, and that the regulation is based upon such asserted actual effects.

E.2 A use of land, even near that of another party which causes that party a legitimate and reasonable "fear of injury" has been found by the courts to be a "taking" and requiring compensation under the 5th amendment. Thus, evidence of a possible unconstitional action must be allowed in proceedings.

F. The Commission should only rule on whether a justification should be set aside, and then a court of competent jurisdiction could decide a matter on the remaining evidence. Shoud the Commission preempt a regulation, a court of competent jurisdiction could re-instate it as long as it showed that the justification was outside the scope of the matters the Commission could review.

Furthermore, any Commission rules must recognize that states and local jurisdictions may seek redress from the court of competent jurisdiction to rule whether or not the Commission has sought to rule on a matter that is beyond its authority given in Paragraph 7, such as regulating compliance. That is, the courts were given the wide general authority to rule on disputes over land use or zoning related decisions to act or failure to act (as in moratoria decisions), and only for a very limited scope was the Commission given authority to settle disputes - hence, by 'default' whenever there is uncertainty as to whether a dispute falls within that of the courts or that of the Commission, it should be the court of competent jurisdiction to decide as it was given the broadest authority by Congress, and should be considered the competent authority whenever there is a dispute over jurisdiction to decide a question.

G. The Commission must make its decisions based only upon justifications given, and may not speculate on how much of the evidence in the record affected the decison. To do otherwise would be an unconstitutional act violating due process and the 10th amendment, as it is the right of states to determine the justification for their judicial decisions.

H. The Commission may not preempt agreements made by private entities, but only by governments and their instrumentalities, which exclude private entities - any forceful 'taking' would be protected by the 'due process' provisions of the 5th amendment.

I. 12. For general public/uncontrolled conditions, an 'interested party' is any party asked to participate by those living or working near a site or who are faced with similar concerns as at a disputed site, and as such are legitimate intervenors.

J. FCC's proposals for compliance are not adequate because there is no means of relief of false certification, cities and counties do not have the funds to prove false statements. Those who provide or who benefit from and pay for the service should be the ones to pay to assure compliance is met, not the public (i.e. not governmental agenicies) - this is the recommendation of the LSGAC.

K. Other reasons why evidence of potential adverse health effects should be permitted in proceedings include:

Doing otherwise is contrary to Due Process and Freedom of Speech. Since the FDA says FCC rules can cause death due to RF interference and that there are other health effects observed, and since the action of a zoning or land use proceeding not only includes approval or disapproval, but also, findings of fact, therefore, the presentation of such information will facilitate local or state action to mitigate effects. Findings of fact are relevant for making those affected aware of potential adverse effects, effects on property values, and denial of such evidence may adversely affect subsequent tort claims. Due process requires that those affected by a decision be made aware of the possible effects, and requires the local jurisdiction being made of the effects so it can take appropriate actions to protect residents, office workers, and property values should the site

be approved. Freedom of Speech includes being able to speak in the relavent forum which is as described above.

L. Per Commission request to know how long it takes to process a permint (FCC 97-303, para #138), know that it took from about seven months - from about August 1, 1996 to February 1997, to post notices, get comments, make a recommendations, have a hearing, prepare a recommendation, hear an appeal, and then go before the full City Council. [see City of Seattle Council File number CF 301494.

M. Per FCC 97-303, para. #139 - to the extent that the Commission has authority under a constitutionally valid statute, it may preempt only when a court of competent jurisdiction determines Commission review is needed. Section 704 gives unlimited authority for zoning and land use decisions, with the exception of that given in (7)(iv)-(v). Yet there is a question of whether a decision is based at all on conditions provided for in (7)(iv)-(v), and if so, if to an extent that it would affect the final outcome. Where the Commission to make such decisions this would turn the statue on its head, therefore, upon receiving notice of complaint from the Commission, the local authority may petition the court of competent jurisdithe court of local jurisdiction needs to determine that (7)(iv)-(v) applies, will have a substantive effect on the decision, and so seek Commission review.

N. The Commission asks how it should define regulations based "directly or indirectly" on the environmental effects of RF emissions."

Electric power decisions determine that public opinion need not relate to actual effects. Statute is specific in referring to regulations based on actual environmental effects. Public opinion is not an environmental effect, direct or otherwise.Since the Commmission and industry finds that rules protect the public health and that there are no environmental effects that merit concern, then it is clear that adverse public opinion, in the Commission's view are not based on actual